IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
Central Excise Reference No. 2/2001

The Commissioner Central Excise & Customs, P.O.Box no.81, Telangkhedi Road, Civil Lines Nagpur vs. The Customs, Excise And Gold (Control) Appellate Tribunal, 3rd Floor, PNB House Sir P.M.Road, Fort Mumbai and another.

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

CORAM : A.P. Lavande & R.V.More,JJ
DATE : 8.10.2007

Heard Mr. S.K.Mishra, Assistant Solicitor General for the applicant and Mr. A.A.Naik, learned counsel for the respondent no.2.

2. Aggrieved by the order dated 6.11.2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT for short), the revenue has approached this Court seeking reference. The Assistant Collector, Nagpur issued show cause notice dated 25th July, 1989 to the assessee to show cause as to why the deemed credit on waste and scrap should not be denied as they were purchased from open market and no duty was paid thereof and further why credit of duty on such waste and scrap should not be recovered under Rule 57(I) read with Section 110 of the Central Excise Act, 1944. Considering the cause

shown by the assessee the Assistant Collector disallowed deemed credit of duty. Being aggrieved the assessee preferred appeal before the Commissioner. The Commissioner remanded the matter back to the Assistant Collector for de novo consideration. The Assistant Collector by order dated 23.12.1991 disallowed the credit. Being aggrieved the applicant preferred appeal to the Commissioner Appeals and by order dated 29.4.1993 the Commissioner of Appeals allowed the appeal holding that the assessee was entitled to to the duty for the stock held on 1.3.1986 under Rule 57(H) and further held that the rest of the credit with effect from 1.4.1986 would be governed under Rule 57 A read with Section 57 (G). Being aggrieved the applicant filed an appeal to CEGAT. The CEGAT by order dated 13.4.1998 dismissed the appeal inter alia holding that the grounds raised by the Revenue were totally different vis-a-vis the show cause notice and hence it was not permissible for the Revenue to raise these grounds. The CEGAT held that since the issue in the show cause notice was entirely different the revenue could not urge the grounds raised in the appeal before the Tribunal. Thereafter the revenue made an application under Section 35(G) (1) of the Act which has been dismissed by the order dated 6.11.2000 on the ground that the Tribunal could

not permit the department to embark upon the fresh case which was not done for the show cause notice. In support of this finding reliance was placed on the Judgment of the Apex Court in Gujarat State Fertilizers Co. vs. Collector of Central Excise (1997 (91) E.L.T. 3 Supreme Court.

3. Mr. Mishra, Assistant Solicitor General submitted that since the assessee has not paid any duty on waste scrap he was not entitled to modvat credit and, therefore, the order passed by the CEGAT cannot be sustained. According to Mr. Mishra, the following substantial questions of law arise in the present matter:

1. Whether, once it was decided by the Commissioner (Appeals) that admissibility of MODVAT Credit was subject to the requirements under rule 57-H(2) of the Central Excise Rules, 1944 about the inputs having paid duty after 31.1.86, deemed credit on iron and steel scrap could be allowed without complying with the provisions of Rule 57-H (2) of the Central Excise Rules, 1944, and was it correct on the part of the Non Applicant No. 1 to reject department's Appeal and dismiss the Reference Application without any decision on the point or direction for examining

whether in the instant case the duty on impugned inputs was paid on or before 31.1.1986 or not and the provisions of Rule 57-H (2) were complied with.

2. Whether, when the Commissioner (Appeals) based his Order in Appeal in principle on the law settled down by the Non Applicant No.1 holding that provisions of Rule 57-H(2) of Central Excise Rules, 1944 would apply but passed the order without regard to the provisions of the said rule and when that point which was a point of law was agitated before the Hon'ble CEGAT in Appeal, was it correct for the CEGAT to hold that " the Department is precluded from raising this ground before the Tribunal challenging the order of the Commissioner (Appeals) who did not have occasion to go this aspect when he passed the impugned order."

4. In support of his submission Mr. Mishra relied upon the Judgment of the Apex Court in Variety Metals Pvt. Ltd. vs. Collector of Central Excise, Pune (2004(174) E.L.T. 16 S.C..

5. Per contra Mr. A.A.Naik, the learned counsel for the assessee submitted that the Tribunal was absolutely right in dismissing the appeal filed by the department on the ground that entirely new case was

set up vis-a-vis the show cause notice issued to the assessee. According to Mr. Naik no substantial question of law arises in the present matter and, therefore, the present reference deserves to be rejected. In support of his submission Mr. Naik relied upon the following Judgments.

i) Gujarat State Fertilizers Co. vs. Collector of Central Excise.
1997 (91) E.L.T. 3 (S.C.);

ii) Commissioner of Central Excise, Nagpur vs.
Vicco Laboratories,
(2005) 4 Supreme Court Cases 17.

6. We have carefully considered the submissions made by the learned counsel for the rival parties and also perused the records and the judgments relied upon. The CEGAT has dismissed the appeal filed by the department and refused to make any reference primarily on the ground that the department in appeal has urged grounds which were not taken in the show cause notice and, therefore, the department was not entitled to urge those grounds. Consequently, the CEGAT refused to make any reference.

7. We find no illegality in the approach of the CEGAT. The CEGAT has rightly held that the department was not entitled to urge new grounds in appeal before it. Therefore, the Tribunal also was right in refusing to make reference. In so far as the Judgment of Variety Metals Pvt. Ltd. (supra) relied upon by the department is concerned the same does not advance the case of the department because the Tribunal has dismissed the appeal and has refused to make reference solely on the ground that the department cannot urge new grounds which are not taken in the show cause notice to the assessee. This being the position, we find that no substantial question of law is involved in the present reference. Hence, the reference is rejected.

Judge **Judge**

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